No. 57196-0-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

Terry L. Kincer
Appellant,

vs.

State of Washington
Respondent.

Appellant's Opening Brief

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ASSIGNMENT OF ERROR

The trial court erred when it applied federal law to deny Mr. Kincer's petition to restore firearm rights. Federal law has no bearing on restoration of firearm rights under Washington state law.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is a trial court required to apply federal law when ruling on a petition to restore firearm rights under RCW 9.41.040(4)?

STATEMENT OF THE CASE

On March 10, 2022, Mr. Kincer filed a petition to restore his firearm rights with the Jefferson County Superior Court under cause number 22-2-00033-16. Clerk's Papers (CP) at 1-2. The petition stated that it was being filed under RCW 9.41.040(4) and listed Mr. Kincer's predicate firearm prohibitor as an assault 4 domestic violence conviction out of Bremerton Municipal Court. *Id.*

The State filed an objection, arguing that Mr. Kincer's conviction for assault 4 domestic violence triggered the federal prohibition for misdemeanor crimes of domestic violence under 18 U.S.C. § 922(g)(9), and the application of federal law prohibited the Court from restoring Mr. Kincer's firearm rights under Washington state law. CP at 3-5; 10-31. The State did not allege that Mr. Kincer did not meet the eligibility requirements of RCW 9.41.040(4). *Id.*

Following argument, the trial court adopted the State's argument and denied the petition. CP at 32-39. Mr. Kincer timely appeals. CP at 40.

ARGUMENT

A. RCW 9.41.040(4) entitles Mr. Kincer to a restoration of firearm rights.

RCW 9.41.040(4) states that "if a person is prohibited from possession of a firearm under [.040(1) or (2)] . . . the individual may petition a court of record to have his or her right

to possess a firearm restored." The right to petition for restoration of firearm rights is not unlimited: a conviction for a class A felony, a sex offense, or a crime punishable by a maximum sentence of at least twenty years will categorically disqualify a person from restoration. *Id.* None of these limitations are applicable here.

The statute further specifies the eligibility rules for restoration. When the predicate firearm prohibitor is a nonfelony offense, as is the case here, RCW 9.41.040(4)(a)(ii)(B) requires three consecutive crime-free years in the community, completion of all sentence conditions, no pending charges, and no prior felony points counted as part of the offender score. "Once all the statutory requirements for restoration have been satisfied, a superior court's role in approving the petition is purely ministerial; the court has no discretion." *State v. Dennis*, 191 Wn.2d 169, 172, 421 P.3d 944 (2018).

In the last twenty years, RCW 9.41.040(4) has been frequently attacked by prosecutors urging courts to impose additional requirements not stated in the statute. Fortunately, the courts have repeatedly and uniformly rejected these invitations, instead choosing to enforce the plain language of the statute. This case requires the Court to continue the tradition by rejecting misguided arguments by the State.

In *State v. Swanson*, the State argued that the trial court retains discretion in granting or denying a petition to restore firearm rights. 116 Wn. App. 67, 65 P.3d 343 (2003). This Court held otherwise, stating:

> Because RCW 9.41.040(4) imposes no requirements other than the enumerated, prepetition requirements noted above, Swanson had no burden to show that he is safe to own and possess guns. If the legislature desired to impose that burden, it certainly knew the language to employ, as evidenced by the other statutes discussed above that impose such a burden. By the legislative omissions in the statute, we hold that RCW 9.41.040(4) imposes only a ministerial duty on the court when the enumerated, threshold requirements are met.

Id. at 78. This holding was later adopted by our supreme court in *Dennis*, 191 Wn.2d at 172.

In *Rivard v. State*, the State argued that a person with a class B felony conviction must wait ten years instead of five in order to restore firearm rights. 168 Wn.2d 775, 231 P.3d 186 (2010). Our supreme court disagreed, ruling that because Rivard "has no criminal history aside from the vehicular homicide conviction (the disabling offense), his eligibility to petition for the restoration of his firearm rights is determined by the five-year period." *Id.* at 784.

In *Payseno v. Kitsap County*, the State argued that the five-year crime-free period must be the most recent five years prior to the filing of the petition for restoration. 186 Wn. App. 465, 346 P.3d 784 (2015). Applying the rule of lenity, this Court held that the five-year crime-free period may be any five years and does not have to be the most recent five years. *Id.* at 473-74.

In *State v. Dennis*, the State - refusing to take "no" for an answer - again argued that the five-year crime-free period must be the most recent five years. 200 Wn. App. 654, 402 P.3d 943 (2017). The State decided to take another stab at the issue because *Dennis* was in Division I instead of Division II. It worked - temporarily. Division I sided with the State and created a division split with Division II on this issue. *Id.* The supreme court later reversed Division I. 191 Wn.2d 169.

In *Benson v. State*, the State lodged three attacks: it argued that second degree robbery was categorically ineligible for restoration; that a class B felony sentenced on the same day as a class C felony but under a different cause number had to wash before restoration could occur; and that the petitioner had to prove compliance with sentence conditions for a felony predicate. 4 Wn. App. 2d 21, 419 P.3d 484 (2018). Based on a plain language reading of RCW 9.41.040(4) and *Rivard*, this Court rejected all three arguments. *Id.*

In *State v. Burke*, the State argued that a juvenile court did not have jurisdiction to issue a restoration of firearm rights because it was not a court of record and because the petitioner was no longer a juvenile at the time of the petition. 12 Wn. App. 2d 943, 466 P.3d 1147 (2020). This Court held otherwise, finding that the juvenile court is simply a division of the superior court and that "the superior court had jurisdiction to consider Burke's petitions to restore his firearm rights and the superior court judges had authority to grant those petitions." *Id.* at 952.

In *State v. Manuel*, the petitioner filed a motion to restore firearm rights in King County Superior Court and listed as predicates felony and misdemeanor convictions from multiple counties. 14 Wn. App. 2d 455, 471 P.3d 265 (2020). The State argued that King County Superior Court had jurisdiction to enter a restoration only as to the predicate matters that occurred in King County Superior Court and that restoration for the other predicates would have to come from a different county. *Id.* at

458. Division I held that any superior court where a predicate conviction occurred has jurisdiction to issue a full restoration of rights, regardless of where any other predicates may have occurred. *Id.* at 468. Specifically, Division I held that "[e]xpressio unius est exclusio alterius commands that RCW 9.41.040(4) impose no burden beyond the three enumerated in subsection (a), and consequently supports the proposition that both venues have full authority to restore Manuel's right to possess a firearm." *Id.* at 466.

In *State v. B.B.,* the State argued - again - that a juvenile court could not entertain a motion to restore firearm rights when the petitioner was over eighteen years of age at the time of the motion. 18 Wn. App. 2d 556, 492 P.3d 861 (2021). On this point, Division III adopted this Court's *Burke* decision: "[W]e adopt the persuasive reasoning and the holding in *State v. Burke* as our own." *Id.* at 562. The State also argued that a motion to restore firearm rights could not be filed under the existing criminal or juvenile cause number and had to be filed

as a new civil petition with a $240 filing fee under local county custom. *Id.* at 563. The court smacked down this argument:

> Although sometimes in its brief the State writes that "the court" adopted this unwritten rule, the State presents no information that the superior court judges of Kittitas County adopted a rule, policy, or practice. Instead, the State admits that the clerk of the Kittitas County Superior Court implemented, as a local practice, the condition of a separate civil suit. The clerk lacks authority to adopt procedures for the superior court.

Id. at 564.

This review of case law paints a clear picture: prosecutors across the state have repeatedly and systematically attempted to take liberties with the firearm restoration statute and the courts have uniformly and consistently rejected all such attempts. The resounding chorus from every court to consider a firearm restoration issue is that <u>there are no requirements beyond those explicitly contained in the statute and once those requirements are met, the court's duty is ministerial.</u> Despite the unprecedented levels of unanimity and clarity among the courts on this issue, the State is going to ask this Court to read a new

requirement into the statute that isn't there. The Court must reject this invitation like it has rejected the others.

B. Federal law has no impact on the restoration of firearm rights under RCW 9.41.040(4).

Below, the State argued that restoration under RCW 9.41.040(4) was inappropriate because federal law preempted state law. CP at 10-31. The State assumed that Mr. Kincer's conviction for assault 4 domestic violence triggered the federal prohibition on firearms in 18 U.S.C. § 922(g)(9) as a misdemeanor crime of domestic violence, yet did not provide any actual argument or evidence.

Federal law defines "misdemeanor crime of domestic violence" with two requirements: the force requirement and the relationship requirement. 18 U.S.C. § 921(a)(33)(A)(ii). First, the underlying predicate must contain an element of physical force, defined as a "degree of force that supports a common-law battery conviction." *United States v. Castleman*, 572 U.S. 157,

168 (2014); 18 U.S.C. § 921(a)(33)(A)(ii). Second, the defendant must be a current or former spouse, parent, or guardian of the victim; must have a child in common with the victim; must have cohabitated with the victim as a spouse, parent, or guardian; or must have a current or recent dating relationship with the victim. 18 U.S.C. § 921(a)(33)(A)(ii).

Washington state law differs significantly from federal law. First, Washington state's definition of "assault" does not require force: "assault encompasses (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." *State v. Jarvis*, 160 Wn. App. 111, 117-18, 246 P.3d 1280 (2011). Second, Washington state's universe of relationships that constitute "domestic violence" is much broader than the federal statute. "Domestic violence" requires that a crime be committed by one "family or household member" or "intimate partner" against

another. RCW 10.99.020(4). While the state's definition of "intimate partner" is closely related to the federal definition, the state's definition of "family or household member" is much broader and includes adult persons related by blood or marriage and even adult roommates. RCW 10.99.020(7).

Because of these differences in state and federal law, Mr. Kincer could have been convicted of assault under the "apprehension of harm" prong, which would not trigger the federal prohibition because this prong does not contain the use of force required under federal law. Or he could have been convicted of assault against a sibling or a roommate, which also would not trigger the federal prohibition because these types of relationships are not included in the federal statute. Instead of submitting even a remotely cogent argument on *how* Mr. Kincer meets the federal prohibition, the State saw the scary words of "domestic violence" and just assumed that the crime must automatically match the federal prohibition, even though that is not the case. But even setting aside the State's

incompetence and assuming Mr. Kincer's conviction does meet the federal prohibition, that still has no impact on a petition to restore firearm rights under RCW 9.41.040(4).

1. RCW 9.41.040(4) does not require consideration of federal law.

"Swanson had no burden to show that he is safe to own and possess guns. If the legislature desired to impose that burden, it certainly knew the language to employ, as evidenced by the other statutes discussed above that impose such a burden." *Swanson*, 116 Wn. App. at 78. "[W]here the legislature omits language from a statute, we may not read language into the statute." *Dennis*, 191 Wn.2d at 178. "Expressio unius est exclusio alterius commands that RCW 9.41.040(4) impose no burden beyond the three enumerated in subsection (a)" *Manuel*, 14 Wn. App. 2d at 466.

Here, if the legislature wanted courts to consider federal law in deciding a petition to restore firearm rights, the legislature could have easily added that language into RCW

9.41.040(4). The legislature certainly knows how to do this. For example, RCW 9.41.070(1)(a) states that an applicant shall be entitled to a concealed pistol license unless "[h]e or she is ineligible to possess a firearm under the provisions of RCW 9.41.040 or 9.41.045, or is prohibited from possessing a firearm under federal law." RCW 9.41.070(2)(b) also states that "[t]he issuing authority shall deny a permit to anyone who is found to be prohibited from possessing a firearm under federal or state law." Likewise, RCW 9.41.090(6)(c) directs that an "application [for the purchase of a pistol or semiautomatic assault rifle] shall not be denied unless the purchaser is not eligible to purchase or possess the firearm under state or federal law."

In fact, a search of RCW 9.41 for the phrase "federal law" reveals dozens of hits. In other words, the legislature has referred to and incorporated federal law many times in RCW 9.41 - yet not once is it mentioned in RCW 9.41.040(4). If it

isn't mentioned, then it may not be considered. Any holding to the contrary is a violation of decades of precedent.

2. Restoring firearm rights under RCW 9.41.040(4) does not violate or implicate federal law.

The State's core error seems to be the erroneous assumption that a restoration order under RCW 9.41.040(4) is a directive by the court to law enforcement to allow the petitioner to have a firearm. But that is not the case. Background checks are still required before law enforcement may proceed a transaction, as spelled out in RCW 9.41.070 (concealed pistol licenses) and RCW 9.41.090 (firearm purchases). Both statutes require that there be no prohibition under federal law before the license or purchase can be approved. *See* discussion *supra* Part B.1. But that determination is made at the time the background check is initiated. It is not within the trial court's purview; courts do not do background checks.

Barr v. Snohomish County Sheriff is instructive. 193 Wn.2d 330, 440 P.3d 131 (2019). There, Barr filed a petition

for a writ of mandamus directing the Snohomish County Sheriff to issue him a concealed pistol license on the theory that his juvenile class A adjudication was not a state or federal prohibitor because it had been sealed under RCW 13.50.260. *Id.* at 333-34. Our supreme court affirmed denial of the writ because "the issuing authority . . . shall deny a permit to anyone who is found to be prohibited from possessing a firearm under federal or state law." *Id.* at 335 (quoting RCW 9.41.070(2)(b)). It concluded that "Barr's class A felony adjudications are predicate, disqualifying convictions for purposes of 18 U.S.C. § 922(g)" while "express[ing] no opinion on Barr's right to possess firearms as a matter of state law." *Id.* at 340.

Understanding the distinction between this case and *Barr* is crucial. In *Barr*, the appellant was seeking a court order directing a law enforcement agency to perform some affirmative act - to approve and issue a concealed pistol license - something that requires consideration of federal law per statute. Mr. Kincer does not ask for any such relief. A petition

to restore firearm rights does not ask the trial court to direct any entity to do anything and does not call for consideration of federal law. It only asks the trial court to order the restoration of a state right pursuant to state law.

Mr. Kincer did not ask the trial court to make any proclamations regarding his status under federal law, or to declare his rights under federal law, or to overrule or preempt federal law. He filed a petition under state law in a state court, requesting the restoration of a state right. To that, he is entitled.

CONCLUSION

Based on the foregoing, this Court should reverse and remand with instructions to issue an order restoring Mr. Kincer's firearm rights under RCW 9.41.040(4).

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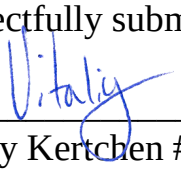

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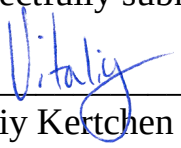

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